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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

CRAIG McCARTHY,
PLAINTIFF-PETITIONER,
v.
THE BARK PEKING, HER SAILS, EQUIPMENT, APPURTENANCES, ETC., AND SOUTH STREET SEAPORT MUSEUM,
DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS,
v.
THE STATE INSURANCE FUND AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
THIRD-PARTY DEFENDANTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

RICHARD L. DAHLEN,
DAHLEN & GATEWOOD,
79 Milk Street,
Boston, Massachusetts 02109.
(617) 451-1560
Attorney for Petitioner

EDWIN F. LAMBERT, JR.,
ZOCK, PETIRE, REID & CURTIN,
19 Rector Street,
New York, New York 10006.
Of Counsel

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Did the courts below err in holding that a ship repairman, painting the mast of a four-masted bark, afloat and in use as a museum ship, was not engaged in maritime employment within the meaning of the Longshoremen's and Harbor Worker's Compensation Act, 3 U.S.C. §§ 901 *et seq.*?

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THE STATE INSURANCE FUND AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
THIRD-PARTY DEFENDANTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Introduction.

The plaintiff in this case was injured while painting the upper mainmast of the defendant vessel, a four-masted ship afloat on the waters of New York Harbor and put to use by the other defendant as a museum. At a point 120 feet above the deck, the gantline holding the plaintiff's bosun's chair aloft parted and he fell sixty feet to smash across a stay. Affirming summary judg-

ment for the defendants, the court below held that the plaintiff was not entitled to sue the ship and its owner under § 5(b) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), because he was not, in that court's view, "engaged in maritime employment" within the meaning of § 2(3) of the Act, 33 U.S.C. § 902(3).

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, *infra*, pp. 1a-9a) is reported at 676 F.2d 42 (1982). The opinion of the United States District Court for the Southern District of New York (Appendix B, *infra*, pp. 10a-14a) appears not to have been reported.

Jurisdiction.

The opinion of the court of appeals is dated April 12, 1982, and was entered on the same date. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1245 (1).

Statutory Provisions Involved.

The pertinent statutes are 1 U.S.C. § 3 and 33 U.S.C. §§ 902 (3), (21), 905(b). They are set forth in Appendix C, *infra*, pp. 15a-16a.

Statement.

1. *The Ship.*

The ship on which the plaintiff was injured, the *Peking*, is a large sailing vessel, weighing 2,883 net tons. Its length is 377 feet overall, and it was launched in 1911 at Hamburg, Germany. She sailed first in the nitrate trade between Europe and South America and then, in the 1930's, became a school ship, moored on the Medway in the United Kingdom. One of her voyages became the basis for a minor maritime classic, *The Peking Battles Cape Horn*, by Irving Johnson (New York, 1st ed. 1931, 2d ed. 1977).

The defendant South Street Seaport Museum acquired the *Peking* in 1974 from a benefactor who contemplated requiring the "usual ship mortgage." The museum, founded in 1967, represents as its "chartered mission" a desire "to promote a major maritime museum, to restore historical architecture and ships, and to revive the economics of the historic Seaport area." It maintains several piers at the foot of Burling Slip in lower Manhattan, and there it moors a number of historical vessels of its own, including the *Pioneer*, a schooner certified for short passenger voyages. South Street Seaport also provides moorings for visiting yachts and ships — most notably the Coast Guard's three-masted bark, the *Eagle*.

When acquired by the museum, the *Peking* made a stormy passage across the Atlantic under the tow of a Dutch ocean-going tug. The voyage was arranged and supervised by a retired Coast Guard commander, a former skipper of the *Eagle*. After repairs at a shipyard on Staten Island, the *Peking* was towed across the harbor to the museum's piers in time for the bicentennial "Tall Ships" celebration in July, 1976. She has been moored there since, shifting on occasion from pier to pier.

As one might expect, and as is consistent with the museum's self-appointed task of restoring ships, the *Peking* remains a

large and complex piece of machinery designed and maintained to float and move about on navigable waters. As the museum's president admits, she is capable of being towed around the harbor or out to sea. Her rudder is locked but her hull is, of course, intact, and her masts, spars, and rigging are aloft. The *Peking* has the other customary components of a sea-going ship, including decks, 'tween decks, compartments, accommodation ladders, and a bosun's locker — albeit a leaky and wet one. In 1980, after the events in issue here, she was put in the charge of a licensed merchant marine officer, referred to by the museum's vice-president as her "shipmaster," to supervise her repair and to make her safe.

2. *The Plaintiff's Fall Down Her Mast.*

In December, 1979, the plaintiff, Craig McCarthy, was employed by South Street Seaport, as he had been since 1976, and was then assigned the tasks of going aloft and painting the *Peking's* tophamper, or upper masts and spars. On December 12, Mr. McCarthy went aloft the ship's mainmast taking his paint bucket and brush. He climbed the ratlines to the "top," a platform a third of the way up the mast. Thence, he hoisted himself further aloft by sitting in a bosun's chair and hauling on the end of an attached block and tackle which was itself held up by a gantline secured to the deck and rigged through a block at the masthead, or highest point of the mast.

The gantline had been supplied from the *Peking's* bosun's locker, just as would have been the case, according to an experienced chief bosun's mate, whether the *Peking* had been "at sea, in a foreign harbor, or in New York as part of a voyage."

Mr. McCarthy did not know it at the time, but that gantline — a length of one-inch manila rope by which his life was suspended — had been donated to the museum the preceding summer by the bosun of the U.S. Coast Guard ship, *Eagle*.

The museum's waterfront director, who accepted the donation, knew the line was unfit for use aboard the *Eagle*. He was warned by a local rope merchant not to use it aboard the *Peking*. He stowed the line in the ship's bosun's locker, where moisture from the leaky overhead could cause its further deterioration. In October, 1979, the waterfront director instructed a co-worker of Mr. McCarthy to use this line to rig the bosun's chairs for the painting project. Neither the co-worker nor Mr. McCarthy knew anything about inspecting manila rope for safety.

When Mr. McCarthy, on December 12, had reached a point roughly 120 feet above the deck of the *Peking*, the gantline parted. Mr. McCarthy fell sixty feet and smashed across a stay — a length of wire rope extending aft and up from the mainmast to the mizzen topmast. He was able to grasp the stay, climb down to the "top," and from there to the deck below. At a hospital that evening he underwent an exploratory laparotomy, abdominal surgery in which a third of his large intestine was found so damaged it had to be removed.

Existence of Jurisdiction Below.

The plaintiff brought this action in admiralty pursuant to the provision of 28 U.S.C. § 1333(1). It is unquestioned that, at the time he was injured aboard the *Peking*, the ship was afloat on the navigable waters of the United States.

Reasons for Granting the Writ.

First, the decision below is at odds with the language and intent of the applicable federal statute. The extent of the cov-

erage of the Longshoremen's and Harbor Worker's Compensation Act is the central issue here because the plaintiff brings this action pursuant to § 5(b) of the Act as amended in 1972, 33 U.S.C. § 905(b). That section allows a ship repairman who is injured by the negligence of a vessel to sue the vessel — even though the vessel may have been his employer — so long as his injury is not caused by the negligence of a fellow ship repairman and so long as negligence, not unseaworthiness, was the cause of the injury. This exception to the normal worker's compensation bar against an employee suing his employer is based on this Court's decision in *Reed* v. *The Yaka*, 373 U.S. 410 (1963), which held in effect that a longshoreman or harbor worker employed directly by a vessel should have the same right to sue the vessel as have longshoremen and harbor workers employed by stevedores and other independent firms.

Under § 2(3) of the Act, 33 U.S.C. § 902(3), the coverage of the Act extends to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and *any harborworker including a ship repairman, shipbuilder, and shipbreaker*, but [not to] a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (Emphasis added.) The term "maritime employment" is not otherwise defined by the Act, but Congress' inclusion within it of the work done by shipbreakers as well as by ship repairmen ought to be dispositive here. Mr. McCarthy, repairing the *Peking* by painting its tophamper and thereby preventing it from becoming a floating hazard, engaged in no less a maritime task than workmen who will someday, when the vessel is placed in drydock, dismantle the very same masts and spars.

As one commentator, critical of the court of appeals' decision, has succinctly pointed out, "Mr. McCarthy was not a

house painter." Paul S. Edelman, "Old Sailing Ships Never Die But Don't Sail Away, Either," *New York Law Journal*, May 7, 1982, p. 1, col. 1.

The court of appeals was of the view that the coverage of the Act ends when a ship ceases to be a part of active navigation and commerce, but the Act itself contains no such limitation, excluding only work done on small ships of less than eighteen net tons, and the court of appeals' position is inconsistent with the applicable statutory definition of "vessel," in 1 U.S.C. § 3, which provides that the term includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

This statute has never been limited only to vessels in active navigation. Indeed, in the *C.H. Northam*, 181 Fed. 983 (D. Mass. 1909), for purposes of limitation of liability, a hulk already in the process of being broken up was held to be a vessel. In *Pleason* v. *Gulfport Shipping Corp.*, 221 F.2d 621 (5th Cir. 1955), another hulk, powerless and with its steering mechanism removed, was held to be a vessel subject to a maritime lien. Most strikingly, in the only other reported case involving a museum ship, *Luna* v. *Star of India*, 356 F. Supp. 59 (S.D. Cal. 1973), in establishing admiralty jurisdiction in a general negligence case, the court held that the term "vessel" encompasses a ship maintained in precisely the same circumstances as those of the *Peking* — as a public museum which had not been in active commercial navigation for decades.

Second, the decision below is far more restrictive in its definition of "maritime employment" than the decisions of other courts of appeals applying the Act.[1] These decisions include

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[1] The decision may well also be at odds with the views of this Court, depending upon the determination of *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 8-1897, in which certiorari was granted on February 22, 1982, but which has not yet been argued or decided. That case also involves the Second Circuit's views on the extent of the Act's coverage.

Mississippi Coast Marine v. *Bosarge*, 637 F.2d 994 (5th Cir. 1981), holding that a carpenter repairing a small yacht in a boatyard was engaged in maritime employment; so also was it held to be maritime employment in *Howard* v. *Rebel Well Service*, 632 F.2d 1348 (5th Cir. 1980), as to a sandcaster working on a tank removed from a drilling barge; *Boudloche* v. *Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), a truck driver lifting a small boat out of navigable waters; and *Duncanson-Harrelson Co.* v. *Director, Etc.*, 644 F.2d 827 (9th Cir. 1981), a workman exposed "to many of the 'perils of the sea' associated with traditional maritime activity" while constructing a mooring post.

While it is true that Mr. McCarthy's employer is, in general, a museum — albeit one which operates piers and passenger cruises, hires shipmasters, and purports to restore ships, it is also true that the activity in which Mr. McCarthy was engaged at the time he was injured was of a traditional maritime nature. He was not injured by a collapsing museum exhibit, nor by an object thrown by an unruly museum patron, nor by any other such occurrence as might happen in the world of curators and display cabinets. He was instead injured when he was performing routine shipboard maintenance and repair work aloft in the tophamper of a ship and when the gantline holding his bosun's chair parted. It parted because it had not been maintained or inspected in accordance with standards necessary aboard ship.

This case represents the harshest limitation yet placed by the Court of Appeals for the Second Circuit upon the coverage of the Longshoremen's and Harbor Worker's Compensation Act. The case on which the court below primarily relied, *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (2nd Cir. 1980), had to do with construction workers injured while building a sewage disposal plant over the Hudson River. Mr. McCarthy was not a construction worker, no more than he was a house

painter. He was a ship repairman, and this petition for a writ of certiorari presents the question whether the Act should be applied, as its language commands, to "any harborworker including a ship repairman."

Conclusion.

The Court should review this case because it presents a significant question concerning the coverage of the Longshoremen's and Harbor Worker's Compensation Act. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD L. DAHLEN,
DAHLEN & GATEWOOD,
79 Milk Street,
Boston, Massachusetts 02109.
(617) 451-1560
Attorney for Petitioner

EDWIN F. LAMBERT, JR.,
ZOCK, PETIRE, REID & CURTIN,
19 Rector Street,
New York, New York 10006.
Of Counsel

Appendix A.

United States Court of Appeals for the Second Circuit.

No. 445 August Term, 1981

(Argued December 14, 1981 Decided April 12, 1982)

Docket No. 81-7587

CRAIG McCARTHY,
Plaintiff-Appellant,

v.

THE BARK PEKING, her sails, equipment, appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,
Third Party Plaintiff-Appellee,

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE,
Third Party Defendants-Appellees.

BEFORE:
TIMBERS, KEARSE and CARDAMONE, *Circuit Judges.*

Appeal from a summary judgment entered on motion of defendant South Street Seaport Museum, pursuant to Fed. R. Civ. P. 54(b), in the Southern District of New York, Whitman

Knapp, *District Judge*, dismissing an action in which plaintiff, an employee of the Museum, sought damages and other relief as the result of his fall from a bosun's chair suspended by a gantline on the Bark Peking while the latter was berthed at the Museum.

Affirmed.

Richard L. Dahlen, Boston, Mass. (Edwin F. Lambert, Jr., Dahlen & Gatewood, Boston, Mass; and Zock, Petrie, Reid & Curtin, New York, N.Y., on the brief), *for plaintiff-appellant*.

Francis X. Byrn (William J. Troy III, and Haight, Gardner, Poor & Havens, New York, N.Y., on the brief), *for third party plaintiff-appellee South Street Seaport Museum*.

Raymond C. Green and Susan R. Petito, New York, N.Y., filed a brief *for third party defendant The State Insurance Fund*.

Alan G. Choate, Joseph F. Moore, Jr., Wayne W. Suojanen, and Pepper, Hamilton & Scheetz, Philadelphia, Pa.; and Mark O. Kasanin, Richard C. Brautigam, and McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., filed a brief amici curiae *for National Maritime Historical Society and National Maritime Museum Association*.

TIMBERS, *Circuit Judge*:

On this appeal from a summary judgment entered on motion of defendant South Street Seaport Museum, pursuant to

Fed. R. Civ. P. 54(b),[1] in the Southern District of New York, Whitman Knapp, *District Judge*, dismissing an action in which plaintiff, an employee of the Museum, sought damages and other relief as the result of his fall from a bosun's chair suspended by a gantline on the Bark Peking while the latter was berthed at the Museum, the questions presented are (1) whether the district court correctly ruled that plaintiff was not engaged in "maritime employment" so as to bring him within the definition of an employee in § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 902(3) (1976);[2] and (2) whether the district court correctly ruled that plaintiff had forfeited his right to claim a wrongful discharge pursuant to § 11(c)(1) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c)(1) (1976).[3]

We agree with Judge Knapp's rulings with respect to both questions. We affirm.

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[1] The district court issued a Rule 54(b) certificate because no adjudication was made with respect to defendants The State Insurance Fund and Northbrook Excess and Surplus Insurance Company, both of whom disclaimed coverage under their respective policies.

[2] 33 U.S.C. § 902(3) (1976) provides:

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

[3] 29 U.S.C. § 660(c)(1) (1976) provides:

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter."

I.

In his opinion dated June 3, 1981, Judge Knapp succinctly described the Bark Peking as follows:

> "The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent."

We adopt Judge Knapp's description of the vessel which is supported by the record. We note only that, like all venerable vessels which never die, the Peking would like nothing more than to slip its moorings, ease into the harbor and head for the open seas, with the seagulls in its wake.

Sadly, it is fated not to do so.

II.

On December 12, 1979, plaintiff Craig McCarthy, a self-styled "historical ironworker and shiprigger," while employed

by the Museum, was painting the upper mainmast and spars of the Peking. He was suspended in a bosun's chair which he controlled by a gantline — a length of one-inch manilla line. The gantline "parted", causing plaintiff to fall some 60 feet where he grabbed a stay and thence climbed down another 60 feet to the deck below. He returned to work on March 13, 1980.[4]

On March 14, 1980, the day following his return to work, plaintiff, after conferring with members of the staff of the Museum, met with John B. Hightower, the president of the Museum. Plaintiff told Hightower that the Peking was seriously unsafe in several respects. Hightower, believing that plaintiff's conduct amounted to insubordination, fired him.

On June 9, 1980, plaintiff commenced the instant action in the Southern District of New York. In Count I of his complaint, plaintiff alleged admiralty and maritime jurisdiction and asserted a claim under the LHWCA for negligence against the Museum and the Peking, claiming that their negligence caused his fall on December 12, 1979. In Count II of his complaint, plaintiff alleged that the Museum discharged him in violation of his rights under the OSHA and the regulations promulgated thereunder.

Upon the Museum's motion for summary judgment, Judge Knapp, in a well reasoned opinion granted the motion with respect to both counts of the complaint and dismissed the action. From the judgment entered on Judge Knapp's opinion, this appeal has been taken.

III.

Turning to appellant's claim under the LHWCA, he contends, first, that he was an "employee" within the meaning of

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[4] In order to obtain compensation for the injuries he sustained as the result of his fall on December 12, 1979, appellant applied for and received benefits under the New York Workers' Compensation Law.

§ 2(3) of the LHWCA, 33 U.S.C. § 902(3) (1976). Second, he contends that he was injured as the result of the negligence of a vessel within the meaning of 33 U.S.C. § 905(b) (1976), so that his remedies are not limited by the exclusivity provision of the LHWCA, 33 U.S.C. § 905(a) (1976). Since we hold that the record establishes that he was not engaged in maritime employment, we do not reach his second contention.

In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), the Supreme Court explained that the status test for recovery under the LHWCA is not directed at geographical considerations but which "refers to the nature of a worker's activities."[5] *Id.* at 78. The fact that appellant's accident took place on the Peking is not dispositive of the question of whether he was engaged in "maritime employment" within the meaning of § 2(3) of the LHWCA.

Our Court, in decisions since *Pfeiffer*, has interpreted the status test to "preclud[e] any application of the LHWCA . . . to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." *Fusco* v. *Perini North River Associates*, 662 F.2d 1111, 1113 (2 Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). *Accord, Churchill* v. *Perini North River Associates*, 652 F.2d 255, 256 n.1 (2 Cir. 1981) (per curiam) (quoting *Fusco*), *cert. granted sub nom. Director, Office of Workers' Compensation Programs* v. *Perini*, 50 U.S.L.W. 3668 (U.S. Feb. 22, 1982). Other courts of appeals have adopted or retained similar tests subsequent to *Pfeiffer*. *E.g., Duncanson-Harrelson Co.* v. *Director, Office of Workers' Compensation Programs*, 644 F.2d 827, 830 (9 Cir. 1981); *Odom Construction Co.* v. *Department of Labor*,

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[5] The LHWCA also includes situs requirements which are geographical in nature. *Pfeiffer, supra*, at 73-74. There is no suggestion that the LHWCA's situs requirements are not satisfied in the instant case where the accident did take place on navigable waters.

622 F.2d 110, 113 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). The latter two cases rely on *Weyerhauser Co.* v. *Gilmore*, 528 F.2d 957 (9 Cir. 1975), *cert. denied*, 429 U.S. 868 (1976), a pre-*Pfeiffer* case which stated a requirement that "maritime employment" must have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" *Id.* at 961, *quoting Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272 (1972).

We hold that appellant has not satisfied the status test. The Peking's rudder has been welded in one position. She has not put to sea under her own power since the 1930's. Her present owners state that they do not intend to return her to active navigation. The LHWCA was intended to apply only to workers employed in activities related to vessels which at least have the potential to engage in navigation or in commerce on navigable waters. The Peking no longer has that potential.

The cases cited by appellant do not support a contrary conclusion. For example, in *Arbeeny* v. *McRoberts Protective Agency*, 642 F.2d 672 (2 Cir.), *cert. denied*, ____ U.S. ____, 102 S. Ct. 140 (1981), we set aside orders of the Benefits Review Board which denied recovery on the ground that the petitioner pier guards were not engaged in "maritime employment" within the meaning of § 2(3). In that case the dispositive factor was that petitioners' "major function . . . was to protect against the loss of cargo which unquestionably serves a maritime purpose — the safe transit of goods shipped by sea." *Id.* at 675. Appellant's work in the instant case served no such purpose.

Likewise, appellant's reliance on *Mississippi Coast Marine, Inc.* v. *Bosarge*, 637 F.2d 994 (5 Cir.), *modified*, 657 F.2d 665 (1981), is misplaced. There, the Fifth Circuit reviewed an order of the Benefits Review Board which affirmed an award to respondent who, at the time of his injury, was working on a

pleasure boat in his employer's boatyard. Respondent's usual work was that of a land-based carpenter in the boatyard. The Fifth Circuit affirmed the award because "[i]t is difficult to conceive of an activity more fundamental to maritime employment than the building and repair of *navigable* vessels." *Id.* at 998 (emphasis added). Appellant's work in the instant case, unlike that in *Bosarge*, bore no relationship to navigation or commerce on navigable waters.

We hold that, since appellant was not engaged in "maritime employment" within the meaning of § 2(3) of the LHWCA, the district court correctly granted the Museum's motion for summary judgment with respect to Count I.

IV.

This brings us to appellant's second count which alleged that his discharge was discriminatory in violation of § 11(c)(1) of the OSHA, 29 U.S.C. § 660(c)(1) (1976), because he had complained that the Peking was unsafe. The district court granted summary judgment as to this count on the ground that appellant had failed to file a timely complaint with the Secretary of Labor, as required by § 11(c)(2) of the OSHA, 29 U.S.C. § 660(c)(2) (1976).[6]

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[6] 29 U.S.C. § 660(c)(2) (1976) provides:

> "(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

Appellant now urges us to hold that there is a private right of action under § 11(c)(1) of the OSHA. The Sixth Circuit declined to imply such a right of action in *Taylor* v. *Brighton Corp.*, 616 F.2d 256 (6 Cir. 1980). In the instant case, we hold that there is no need for us to reach this question, since appellant did not exhaust the administrative remedies which were available to him.

Whether § 11(c)(2) precludes a private right of action under § 11(c)(1), as the Sixth Circuit held in *Taylor*, appellant first must utilize the remedies provided by Congress. *See, e.g.*, *McKart* v. *United States*, 395 U.S. 185 (1969). Appellant failed to file a timely complaint with the Secretary. The word "may" in § 11(c)(2) does not mean that the remedy provided for in that section is merely one of several alternatives. While we do not reach the question whether there is an implied private right of action under § 11(c)(1), we do hold that, even if one existed, it could be invoked only after the filing of a timely complaint with the Secretary had proved fruitless.

We hold that, since appellant failed to exhaust his administrative remedies, the district court correctly granted the Museum's motion for summary judgment with respect to Count II.

Affirmed.

Appendix B.

ORDER APPEALED FROM (Pages 161-166).

United States District Court
Southern District of New York

CRAIG McCARTHY,

PLAINTIFF,

—against—

THE BARK PEKING, HER SAILS, EQUIPMENT, APPURTENANCES, ETC., AND SOUTH STREET SEAPORT MUSEUM,

DEFENDANT AND THIRD-PARTY PLAINTIFF,

—against—

THE STATE INSURANCE FUND AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

MEMORANDUM AND ORDER
80 Civ. 3258 (WK)

KNAPP, D.J.

The bark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one position and it has not

put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent.

On December 12, 1979 plaintiff, who was at that time an employee of defendant South Street Seaport Museum, was injured when a gant line gave way as he was repainting the PEKING's mast and spars in the course of his duties as an "historic ironworker." He returned to work on March 13, 1980. He has since filed a claim for workmen's compensation under, and has received benefits pursuant to, the New York Workmen's Compensation Law. He returned to work on March 13, 1980.

On March 14, 1980, after conferring with various low-level members of the museum administration, plaintiff met with the president of the defendant museum and asserted that the PEKING was seriously unsafe in several respects. The president, claiming that plaintiff's conduct amounted to insubordination, responded by firing him.

Plaintiff thereafter initiated this lawsuit against the bark PEKING and her owners, defendant South Street Seaport Museum. In Count I of the compiaint plaintiff alleges admiralty and maritime jurisdiction and purports to state a claim against each defendant for negligence causing his December 12, 1979 fall. In Count II plaintiff claims that defendant South Street Seaport Museum discharged him in violation of his rights under § 11(c)(1) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c)(1), and regulations promulgated thereunder, 29 C.F.R. § 1977.9(c) and seeks backpay and an order requiring the museum to reinstate him to his employment and to refrain from instructing him to work in unsafe conditions.

The defendants now move for summary judgment on both counts. For reasons that follow, we grant that motion.

Discussion

Count I

It is now settled that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), extends only to workers engaged in "maritime employment." *P.C. Pfeiffer Co., Inc.* v. *Ford* (1979) 444 U.S. 69, 73; *Fusco* v. *Perini North River Associates* (2d Cir. 1980) 622 F.2d 1111, 1113, *cert. denied sub nom. Sullivan* v. *Perini North River Associates* (1981) 101 S. Ct. 953. Having carefully considered the arguments of counsel, we conclude that plaintiff was not engaged in such "maritime employment."

In *Fusco*, the Second Circuit construed "maritime employment" to import a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." *Fusco, supra*, 622 F.2d at 1112. This brings to mind Judge Dawson's observations concerning admiralty law in *McGuire* v. *City of New York* (S.D.N.Y. 1961) 192 F. Supp. 866. He there stated (at 871):

> "Admiralty law is, in fact, the law of commerce. It was engendered as a result of the needs of commerce and flourished because of those same needs. Where it was feared that local ordinances or decisions might unduly impinge on international or interstate commerce, local statutes were held inapplicable in the face of the need for uniformity in maritime law. The touchstone has been whether the action . . . was not merely one of local concern but was in fact a thing having an intimate relation with navigation and interstate and foreign commerce."

In the case at bar plaintiff's employment had no relationship to navigation or to commerce over navigable waters. He

was a museum employee and his activities related to keeping the museum in order. It is immaterial that the museum had at one time been a vessel in navigation, or that it happens to be located on navigable waters. Neither of these facts creates a "realistically significant relationship" between plaintiff's employment and ongoing navigation, or between such employment and interstate or foreign commerce. To the contrary, it is clear that plaintiff's employment was of purely local concern.[1]

Plaintiff apparently concedes — as he must — that unless his negligence claim falls within the ambit of LHWCA, it is barred by the exclusivity provision of the New York Workmen's Compensation Law, *O'Rourke* v. *Long* (1976) 41 N.Y.2d 219, 391 N.Y.S.2d 553. It follows that such claim must be dismissed.

Count II

Plaintiff predicates his claim for wrongful discharge on § 11(c)(1) of OSHA, 29 U.S.C. § 660(c)(1). That section prohibits an employer from discharging an employee for exercising "any rights" afforded by OSHA. It is clear beyond peradventure, however, that plaintiff is in no position to claim relief under OSHA. The statute sets forth in express detail the procedures to be followed by an employee who believes he has been discharged or otherwise discriminated against in violation of § 11(c)(1) — i.e., because he has exercised any rights afforded him by the Act. Specifically, the statute provides in § 11(c)(2), 29 U.S.C. § 660(c)(2), that such an employee:

---

[1] Any argument that the nature and location of the PEKING may have imposed a greater duty of care on its owners than that borne by owners of less intrinsically dangerous structures goes to the question of negligence and not to the question of coverage under LHWCA.

"may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

Having never filed a complaint with the Secretary alleging that his discharge on March 14, 1980 constituted discrimination within the meaning of § 11(c)(1), plaintiff has forfeited any right OSHA may have afforded him to a remedy for such discharge. We need pass on no other question.

It follows that defendant's motion for summary judgment must be granted. The action is dismissed.

So ordered.

Dated: New York, New York
June 3, 1981

WHITMAN KNAPP, U.S.D.J.

Appendix C.

STATUTES IN ISSUE

POINT I:

1. U.S.C. § 3. *"Vessel" as including all means of water transportation*

The word "vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

33 U.S.C. § 902. Definitions

When used in this Act —

• • •

(3) The term "employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

• • •

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 905. Exclusiveness of Remedy

• • •

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act (33 U.S.C. § 933), and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted is the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury accorred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

No. 82-53

Office-Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CRAIG MCCARTHY,

Plaintiff-Petitioner,

—v.—

THE BARK PEKING, her Sails, Equipment, Appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,

Defendants-Respondents and Third-Party Plaintiffs,

—v.—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

BRIEF IN OPPOSITION TO THE PETITION OF CRAIG MCCARTHY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS X. BYRN
Attorney for Respondent
One State Street Plaza
New York, New York 10004
(212) 344-6800

WILLIAM J. TROY, III
HAIGHT, GARDNER, POOR & HAVENS
Of Counsel

Question Presented for Review

Were the courts below correct in holding that petitioner, a maritime museum employee whose duties involved general maintenance work and historic restoration work for the museum and who was injured doing routine painting aboard a museum ship that has not sailed for fifty years, was not engaged in maritime employment within the meaning of § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)?

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Citations to the Opinions and Judgments Delivered in the Courts Below

The Opinion and Judgment of the United States Court of Appeals for the Second Circuit is reported at 676 F.2d 42 (1982). The decision of the Court of Appeals, without the concurring opinion, is included as Appendix A in the Petition for Writ of Certiorari. The Opinion of the United States District Court for the Southern District of New York has not been officially reported; it is included as Appendix B to the Petition for Writ of Certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-53

CRAIG MCCARTHY,

Plaintiff-Petitioner,

—v.—

THE BARK PEKING, her Sails, Equipment, Appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,

Defendants-Respondents and Third-Party Plaintiffs,

—v.—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

BRIEF IN OPPOSITION TO THE PETITION OF CRAIG MCCARTHY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

This action was commenced by the filing of a Complaint in the United States District Court for the Southern District of New York on June 9, 1980. Petitioner sought to recover damages, pursuant to § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), for injuries allegedly sustained on December 12, 1979

while working as an employee of respondent South Street Seaport Museum ("Museum").* As was done below before both the District Court and the Court of Appeals, petitioner omits important facts and attempts to convert ordinary terminology into a vocabulary flavored with maritime references in an attempt at establishing that he had been engaged in maritime employment, all without any references to a joint appendix or the record below as required by Rule 34.1(g) of the Rules of this Court. In the light of these inaccuracies and omissions, respondent feels constrained to offer this statement of the case.

The District Court made certain evidentary findings relative to the Peking that were adopted by the Court of Appeals as being supported by the record. *McCarthy v. Bark Peking, supra,* 676 F.2d at 44. As the courts below found, the Peking has not put to sea under its own power since the 1930s, is incapable of now doing so and in fact is not subject to inspection by the United States Coast Guard. Additionally, there is no dispute that from 1931 to 1974, the Peking served as a floating school for boys in England, with only a brief interruption during World War II when it was used to provide accommodations for Royal Navy engineering petty officers at Chatham dockyard. (J.A. 45a) After the Peking was purchased for the Museum in 1974, it was towed from England to New York by the Dutch tug Utrecht and arrived in New York on July 22, 1975. It was treated by both English and United States customs officials as a floating hulk. (J.A. 45a)

The Peking is not an enrolled or registered vessel and has not been such since its sailing days. (J.A. 46a) Any work that was performed aboard the Peking by respondent was restoration

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* Petitioner also included a count in his Complaint in which he pleaded a private cause of action under § 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)(1), for an alleged wrongful discharge. The District Court granted respondent summary judgment on this count, the Court of Appeals affirmed and petitioner does not now seek review on this issue.

work "for the sole purpose of restoring Peking as a historically accurate museum exhibit and not for purposes of making Peking fit for a return to traditional maritime navigation and commerce, such as carrying passengers or freight for hire." (J.A. 46a) Contrary to the suggestion found at page 3 of the Petition, there is no "usual ship mortgage" covering the Peking; that portion of the purchase price that was not donated by the foundation that purchased the Peking on behalf of respondent is secured by a security interest under the Uniform Commercial Code. (J.A. 181a, 185a-186a) The individual referred to as a "ship master" at page 4 of the Petition, is in fact not a crew member of the Peking, but simply "a foreman supervising historical restoration work to maintain Peking as a museum artifact." (J.A. 183a-184a)

Although petitioner included "The Bark Peking, her sails, equipment, appurtenances, etc." as a named party in this action, no effort has ever been made by petitioner to proceed against the Peking *in rem*. (*See* J.A. 1a-4a) Thus, the Museum is the sole respondent before this Court. The Museum, a private, non-profit organization (J.A. 42a), was founded in 1967 for the purpose of promoting a major maritime museum, restoring historic architecture and historic ships and reviving the economics of the historic seaport area of New York. (J.A. 166a) Any work performed by the Museum aboard the Peking or other Museum ship artifacts is designed to achieve and maintain historical accuracy and not develop a fleet of navigable vessels.

The Petition mischaracterizes petitioner's position at the Museum by repeatedly stating that he had been a "ship repairman". According to the Complaint (J.A. 6a, ¶ 5) and petitioner's own deposition testimony (J.A. 29)*, petitioner's job title was "historic iron-worker" and his duties generally involved trash clean-up, ticket checking and maintenance work

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* Petitioner's deposition testimony is reproduced in its entirety in the joint appendix below following page 186a. All page references without the letter "a" are to the deposition testimony of petitioner.

about the museum (J.A. 15-19, 30-31) as well as historical restoration work. Indeed, petitioner testified at his deposition that on the very day of his accident his work day began with two hours of garbage pick-up and one hour of sweeping the museum parking lot. (J.A. 47)

On the basis of the facts as developed in the record, including the present status of the Peking, the role of respondent Museum and petitioner's actual duties and responsibilities at the Museum, the courts below found that petitioner was not engaged in maritime employment within the meaning of § 2(3) of the LHWCA, 33 U.S.C. § 902(3). The courts below then held that petitioner's cause of action, if any, was barred by the exclusivity provision of the New York Workmen's Compensation Law, as petitioner had filed for and received compensation benefits under New York law. (*See* Appendix B, 13a)

Rather than limiting the statement of the case to those facts that directly bear on the precise issue of whether he was engaged in maritime employment, petitioner once again as in both courts below attempts to present facts that support his theory of liability that respondent was negligent in supplying manila rope that had not been properly inspected and in failing to supervise petitioner and his co-worker, Geise, in their selection of the line that was used as the gantline. Respondent is reluctant to address the inaccuracies and omissions found in these factual arguments in any detail other than to direct the Court's attention to the facts that petitioner and his co-worker had "carte blanche" to purchase whatever equipment they wished (J.A. 117a), that petitioner participated in and was satisfied with Giese's selection of the gantline (J.A. 41-43) and in fact actually used the gantline on at least two occasions prior to his accident without mishap. (J.A. 45) These facts standing alone undercut any claim of a *Reed* v. *The YAKA*, 373 U.S. 410 (1963), cause of action under § 5(b), 33 U.S.C. § 905(b). *See also Richardson* v. *Norfolk Shipbuilding & Drydock, Corp.*, 621 F.2d 633 (4th Cir. 1980).

Reasons for Denying the Petition for a Writ of Certiorari

Petitioner asserts that a writ of certiorari should be granted because of alleged conflicts between the decision below and the intent of the LHWCA, specifically § 2(3), 33 U.S.C. § 902(3), and decisions of other Circuit Courts of Appeal. It is submitted that no such conflicts exist.

The issue of whether petitioner could maintain an action against his employer necessarily brought into play the extent of coverage under the LHWCA, as petitioner claimed to have sued under § 5(b) of the LHWCA, 33 U.S.C. § 905(b). Such a suit cannot be maintained under the New York Workmen's Compensation Law. *O'Rourke* v. *Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553 (1976).

In granting respondent summary judgment dismissing the Complaint, the courts below held that petitioner was not engaged in maritime employment and thus was not covered by the LHWCA. As this Court noted in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), the 1972 Amendments to the LHWCA replaced "the single-situs requirement with a two-part situs and status standard," *id.*, at 73, for determining whether a worker is covered by the LHWCA. Before a worker may avail himself of the benefits under the LHWCA he must prove not only that he was injured on a site as defined in § 3(a), 33 U.S.C. § 903(a), he must also prove that he was engaged in maritime employment pursuant to § 2(3), 33 U.S.C. § 902(3). The term "maritime employment" embodies "an occupational rather than a geographic concept." Id. at 79. Clearly, a worker may not claim coverage under the LHWCA simply because he is injured upon navigable waters. *See Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980), *on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). As this Court has recognized, the intent of Congress in creating the status requirement in 1972 is best served by focusing "upon the

nature, not the location, of employment" of a worker, even where it does not extend coverage to all workers in the situs area. *P.C. Pfeiffer Co.* v. *Ford, supra* at 83.

The courts below held that petitioner did not meet the status test of § 2(3), 33 U.S.C. § 902(3), only after reviewing petitioner's role at respondent Museum, the history and present status of the Peking and the purposes of respondent Museum and concluding that petitioner's activities did not bear a "significant relationship to navigation or to commerce over navigable waters." This standard, derived from *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249 (1972) and first applied to a coverage question in *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976), has been applied by various Circuit Courts of Appeal that have been presented with the issue of whether a worker was engaged in maritime employment within the meaning of § 2(3), 33 U.S.C. § 902(3). *See Churchill* v. *Perini North River Associates,* 652 F.2d 255, 256 n.1 (2d Cir. 1981) (per curiam), *cert. granted sub nom. Director, Office of Workers' Compensation Programs* v. *Perini,* 102 S. Ct. 1425 (1982); *Fusco* v. *Perini North River Associates, supra; Dravo Corp.* v. *Banks,* 567 F.2d 593, 595 (3rd Cir. 1977); *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs,* 540 F.2d 629 (3rd Cir. 1976); *Conti* v. *Norfolk & Western R. Co.,* 566 F.2d 890 (4th Cir. 1977); *Gilliam* v. *Wiley N. Jackson Co.,* 659 F.2d 54, 56 (5th Cir. 1980); *Hullinghorst Industries Inc.* v. *Carroll,* 650 F.2d 750, 756 (5th Cir. 1981), *cert. denied,* 102 S.Ct. 1037 (1982); *Mississippi Coast Marine, Inc.* v. *Bosarge,* 637 F.2d 994, 998 (5th Cir. 1981); *Odom Construction Co.* v. *Department of Labor,* 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied,* 450 U.S. 966 (1981); *Duncanson-Harrelson Co.* v. *Director, Office of Workers' Compensation Programs,* 644 F.2d 827, 830 (9th Cir. 1981).

This standard is fully consonant with the holding of this Court in *P.C. Pfeiffer Co.* v. *Ford, supra.* Moreover, use of this standard insures that coverage under the LHWCA will not be extended to those workers whose employment is of a purely

local concern. Not all employment involving work upon navigable waters is maritime in nature, just as not all accidents upon navigable waters constitute maritime torts. In *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra,* this Court held that for a tort to be a maritime one, there must be proof that "the wrong bear[s] a significant relationship to traditional maritime activity." *Id.* at 268. Most recently, this Court reaffirmed the holding of *Executive Jet* when it held that a collision between two pleasure boats caused by negligent operation of one of the boats bears a sufficient nexus to traditional maritime activity, *viz.* navigation upon navigable waters, as to constitute a maritime tort. *Foremost Insurance Co.* v. *Richardson,* 50 U.S. L.W. 4778 (June 23, 1982).

In amending the coverage provisions of the LHWCA in 1972, Congress obviously intended to limit coverage under the LHWCA to those workers involved in employment of a federal maritime nature where uniformity in interstate or foreign commerce is an important concern. A careful review of the record below demonstrates conclusively that petitioner's employment involved no federal maritime concerns. He was unquestionably an employee of a *bona fide* maritime museum. His duties were in the nature of general maintenance work about the Museum and did not have the goal of making the Peking or other similar museum artifacts seaworthy and fit for a return to maritime navigation and commerce. Indeed, the Peking had not been in active navigation for almost fifty years as of the time of petitioner's accident. Petitioner has never attempted to controvert these facts. Unquestionably, petitioner's activities did not have any realistic relationship to traditional maritime navigation or commerce.*

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* A bill that has recently been passed by the Senate makes clear the sense of Congress that workers such as petitioner are not within the coverage of the LHWCA. S. 1182, 97th Cong., 2d Sess., 128 Cong. Rec. S9202 (1982). Under this bill, the LHWCA would be amended to expressly exclude from coverage workers in questionable "maritime" lines of work, such as marina employees, grain elevator employees, restaurant employees, and maritime museum employees. As the Senate

Petitioner cites no authorities that apply a standard different from the "significant relationship to navigation or to commerce over navigable waters" standard relied upon by the courts below. In essence, petitioner does not challenge the use of this standard as much as he seeks a revision by this Court of the facts found and relied upon by the courts below. This, obviously, is not the purpose of seeking review by this Court.

None of the authorities cited in the Petition mandate an opposite conclusion. Neither *C.H. Northam,* 181 Fed. 983 (D. Mass. 1909) nor *Pleason* v. *Gulfport Shipping Corp.,* 221 F.2d 621 (5th Cir. 1955) involved the issue of coverage under the LHWCA. *Luna* v. *Star of India,* 356 F. Supp. 59 (S.D. Cal. 1973), while involving a museum artifact, simply held that the District Court had admiralty jurisdiction over an action brought by a non-employee of a maritime museum. *Luna* explicitly did not rule on any other question. *Id.* at 65. None of the other decisions cited in the Petition dealt with museum employees; they did no more than hold that coverage existed under the LHWCA on the particular facts of those cases. Given that the issue of whether there is coverage under the LHWCA turns on the facts of each case, these authorities avail petitioner little.

The holdings of the courts below that petitioner was not engaged in maritime employment within the meaning of § 2(3), 33 U.S.C. § 902(3), are amply supported by the record and are consonant with the decisions of this Court and of other Circuit Courts of Appeal.

While the LHWCA is generally construed liberally to afford compensation coverage, this Court seems to adopt a more restrictive approach where third-party litigation is involved. Thus, in *Bloomer* v. *Liberty Mutual Insurance Co.,* 445 U.S.

Report accompanying S.1182 notes, employers of such workers "lack the necessary nexus to maritime employment and commerce and therefore are properly exempted from the jurisdiction of the Act." S.Rep. No. 97-498, 97th Cong., 2nd Sess. at 30 (July 27, 1982).

74 (1980) this Court, ruling that an employer is not required to share litigation expenses incurred by an employee or to have its employee's recovery against the third party reduced by those litigation expenses, observed that compensation benefits were increased substantially by the amendments and then said, 445 U.S. at 83:

> These increases were linked to two provisions designed to reduce litigation and to insure that stevedores would have sufficient funds to pay the additional compensation.

The Court then mentioned the abolition of the *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), unseaworthiness remedy and the limiting of the cause of action to negligence. Secondly, it noted the elimination of the *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), indemnity action against the employer.

This Court went on to say, 445 U.S. at 83-84:

> Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, and not injured longshoremen. The Senate Report stated:
>
> > '[t]he social cost of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in any real increase in actual benefits for injured workers.'
>
> The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, immunize stevedores and their insurers from liability in third-party actions and assure conservation of stevedore resources for compensation awards to longshoremen.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that a Writ of Certiorari should not issue to review the decision below.

Respectfully submitted,

FRANCIS X. BYRN
Attorney for Respondent

WILLIAM J. TROY, III
HAIGHT, GARDNER, POOR
& HAVENS
Of Counsel

82-53

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CRAIG MCCARTHY,

Plaintiff-Petitioner,

v.

THE BARK PEKING, her Sails, Equipment, Appurtenances, Etc., and SOUTH STREET SEAPORT MUSEUM,

Defendants-Respondents and Third-Party Plaintiffs,

v.

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THIRD-PARTY DEFENDANT-RESPONDENT THE STATE INSURANCE FUND IN OPPPOSITION TO THE GRANTING OF CERTIORARI

RAYMOND C. GREEN
Attorney for Third-Party Defendant-Respondent
The State Insurance Fund
199 Church St.
New York, N.Y. 10007
(212) 962-8900

RAYMOND C. GREEN
SUSAN R. PETITO
On the Brief

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Facts

The relevant facts are as stated in the brief for defendant-respondent South Street Seaport Museum.

Prefatory Statement

The opinion of the Circuit Court of Appeals for the Second Circuit held that the petitioner could not predicate a courthouse suit on Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act because the Longshoremen's Act was not available to him as a source of Workers' Compensation benefits in the first instance, his remedy being rather under the applicable State law, the New York Workers' Compensation Law, and indeed exclusively so. (*Billy* v. *Consolidated Machine Tool Corp.*, 51 NY 2d 152.) The Court of Appeals accordingly felt no need to address the further question of whether if petitioner had been entitled to Longshoremen's Act benefits he could despite that Act's exclusive remedy provision (33 U.S.C. 905[a]) proceed with his suit for damages against South Street Seaport Museum, his employer, on the theory that the Peking was a vessel, South Street Seaport Museum had a separate identity as the owner of that vessel, and it was negligent in that separate identity (33 U.S.C. 905[b]). This brief will not deal with issue addressed and disposed of by the Court of Appeals' opinion. That would be needless redundancy, for the opinion itself and South Street Seaport's brief have comprehensively dealt with that subject. This brief will, however, concern itself with the question left open, and will show that had the Court of Appeals gone on to address the question of the Peking's status it would have determined it not to be a vessel, but rather a museum piece, and would have dismissed on that additional ground.

POINT I

Since the Peking in its present form and function is not a vessel and South Street Seaport Museum, plaintiff's employer, is a museum and not in the shipping business, the Museum did not have a separate identity as a shipowner for Section 905(b) LHWCA purposes and the exclusive remedy provisions of either or both the LHWCA (33 USC 905) and the New York Workers' Compensation Law (§§ 11, 29[6]) mandate dismissal of the complaint.

The dictionary often points the way when attempt is made to build a claim upon a word rather than upon the word's meaning.

Webster's Third New International Dictionary (1964) contains the following definitions at pages 1490 and 2097:

DEFINITIONS

(See opposite ☞)

mu·se·um \(ˌ)myü'zēəm, ◆ -'zē-\ *n* -s [L *Museum*, fr. Gk *Mouseion*, fr. neut. of *Mouseios* of the Muses, fr. *Mousa* Muse — more at MUSE] **1** *obs* : a scholar's library : STUDY ⟨admitted to an audience in his ~ —Charles Johnstone⟩ **2 a** : an institution devoted to the procurement, care, and display of objects of lasting interest or value ⟨British *Museum*⟩ ⟨American *Museum* of Natural History⟩ **b** : a room, building, or locale where a collection of objects is put on exhibition ⟨art ~⟩ ⟨science ~⟩ ⟨striking outdoor ~, two hundred acres of it —Bernard De Voto⟩ **c** : EXHIBIT, COLLECTION ⟨the little ~ of . . . lore assembled in the foyer —Claudia Cassidy⟩ **3** : something that resembles a museum ⟨the parlor was a ~ of Victorian bric-a-brac⟩ ⟨codes are maintained as no mere ~s of legal rules and principles —F.A.Ogg & Harold Zink⟩

museum piece *n* **1** : an object of lasting interest or value (as an antique) suitable for or preserved in a museum ⟨early pie plates, now *museum pieces* —*Amer. Guide Series: Conn.*⟩ ⟨a *museum piece* volume —Claudia Cassidy⟩ ⟨some classics, no longer appropriate for daily use, become . . . *museum pieces* periodically dusted off by the critics —Waldo Frank⟩ **2** : something antiquated or obsolete : a thing of the past ⟨tended to regard the old clerk of court as a *museum piece*⟩ ⟨the taxicabs . . . are early-century *museum pieces* —E.O.Hauser⟩ ⟨contains the substance of lectures . . . which now are almost dated *museum pieces* —Irwin Edman⟩

ship \'ship\ *n* -s *often attrib* [ME *schip*, *ship*, fr. OE *scip*; akin to OHG *skif* ship, boat, vessel for liquids, ON & Goth *skip* ship, boat, OE *scēadan* to divide, separate — more at SHED] **1 a** : any large seagoing boat **b** : a sailing boat having a bowsprit and usu. a square-rigged foremast, mainmast, and mizzenmast each composed of a lower mast, a topmast, a topgallant mast, and sometimes higher masts **2 a** : a boat intended or used for navigation and propelled by power or sail **b** : a boat or structure used for purposes of navigation or intended or used for transportation on a river, sea, ocean, or other navigable water without regard to its form or means of propulsion **3** : a ship's company or crew ⟨the whole ~ cheering the captain⟩ **4** : an incense vessel or boat **5** : one's affairs or good fortune ⟨when his ~ comes in he will pay his debts⟩ **6** : AIRSHIP, AIRPLANE **7** : a part used to move something from one place to another ⟨the ~s of scissors⟩ **8 a** : a unit of at least five sea explorers of the Boy Scouts of America under the leadership of a skipper **b** : a senior girl scout mariner troop

Plainly, the South Street Seaport Museum is just that, a museum; and the Peking is in actuality no longer a ship but is just one of the pieces in the museum's collection.

Museums of natural history or science preserve and display in as lifelike a form and as natural a setting as possible things which once lived. Museums of art display things which are not only art *per se,* such as paintings and sculpture, but also things artistically worked which in their day, but no longer, primarily served every day utilitarian purposes, such as armor, obsolete weapons, furniture, household utensils, etc.; and they even offer the museum viewer a look at things which once were objects of religious worship such as idols and the places in which they were worshipped. As their names denote, seaport museums preserve and present in a seaport setting things which once were ships and other things nautical, which once were used for the purposes for which they were built or fabricated, but now serve to tell us of how and with what men took to the sea in the past.

The Peking is incapable of navigation. It has no sails nor any other motive power; its rudder is frozen. It neither moves in commerce, nor is it intended to be used in transportation as a ship. The Coast Guard says it is not a vessel; the Customs authorities classify it as a hulk. All it is now is a museum piece intended to picture for us against as visually realistic a backdrop as possible what it once was and no longer is, a sailing ship representative of the type of water-borne transportation of its day. Obviously, realistically, in our day the Peking is no more a vessel for Section 905(b) purposes than would be a Viking galley, a Greek bireme, or for that matter Cleopatra's Barge or Noah's Ark (if they still existed, and South Street Seaport was both lucky and wealthy enough to come by them).

That the Peking sits in the water does not change its status from an artifact to a Section 905(b) vessel and give

the Museum two separate statuses vis-a-vis plaintiff for Section 905(b) LHWCA purposes, one as ship repair contractor-employer and the other as vessel owner. It is patent that the Peking is located on the water for at least two practical reasons. First, that gives it a more natural or realistic viewing background. Second, it would obviously be unfeasible to even attempt to put an object of its size and bulk on land or under a roof. It is furthermore obvious that South Street Seaport Museum's only status is that of a museum, and that plaintiff is a museum worker who at times works at the restoration or maintenance of the pieces in the museum's collection.

That the Peking has substantial monetary value all the more demonstrates that it is not a ship for Section 905(b) purposes, for the worth it has is not as a vessel; in that capacity it is absolutely worthless. Indeed, as a ship it would be a white elephant, being incapable of earning even one cent's worth of income as a cargo or passenger carrier. As a ship it would only be a financial drain because of the expenses of maintenance, insurance, etc. On the other hand, it has worth precisely because it is a museum piece, an object of art of antiquity; and because the less of its kind there exist, the greater their value. Just as the great worth even of cracked pieces of ancient pottery or termite-hollowed pieces of ancient furniture lie in their antiquity and rarity, not in their originally intended utility, so too is the Peking's worth. Even if huge outlays of money could restore the Peking to functional use as a vessel, one would no more think of using the Peking for that purpose and thereby endangering its real value, than one would think of using the ancient pottery in one's kitchen to hold food or the ancient furniture in one's living room to sit on.

Analytically, South Street Seaport's ownership of ships of yesteryear no more makes it a Section 905(b) vessel owner than the Museum of Natural History's stuffed

animals makes it a zookeeper or the Metropolitan Museum of Art's collection of ancient weapons makes it a gun owner, armory or gun shop. South Street Seaport Museum's ownership of the Peking no more subjects it to Section 905(b) vessel owner liability than would the Museum of Natural History's ownership of a stuffed tiger subject it to the laws applicable to owners of feral animals. Nor is the Peking in law now a vessel any more than is ancient Egypt's Temple of Dendur now in the New York Metropolitan Museum of Art in law a house of religious worship or the objects in it religious articles.* Today all of these things are only specimens, exhibits, artifacts or works of art, regardless of what they once were or what purpose they once served.

Moreover, the categories of persons who fall within the LHWCA's definitions of the term "vessel" (Section 902[21]), clearly envisages that the ships and shipowners to which the Act applies can be only those actively and actually engaged in commerce, or which realistically have an immediate potential of so functioning. The persons or classes of persons who fall within the "vessel" definition serve only live ships, not hulks or museum pieces, for only live ships have masters, officers and crew members. As to types of enterprises which fall within the "vessel" definition again only live ships need and have agents in their various ports of call to serve their operator's or owner's interests; and third persons charter only live ships and enter into other commercial relationships only with owners of ships which are in fact ships. Hulks and artifacts such as the Peking earn money only as exhibits, not through charter agreements; and they do not need

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* While a child's defacement of the Temple of Dendur or a god statue in it would be an atrocity, that would nonetheless not render his parent sueable under Section 28 of the N. Y. Religious Corporations Law (as added by L. 1981 ch 76) which subjects a parent to civil liability of up to $5000 for the child's malicious destruction of places or articles, etc. of religious worship.

agents for they make no calls at any port; they sit in their outdoor museums just to be visited and admired.

All in all, plaintiff's argument that the South Street Seaport Museum's ownership of the Peking renders it sueable under Section 905(b) premises upon his own refusal to recognize the reality of what is and his insistence that the Peking instead be viewed as what it once was. This argument simply asks all concerned to deny their senses and their reason and substitute fantasy for reality.

The law must focus on the fact of the present day status of the Peking, not on what it was "once upon a time." The plain facts are that the Peking is not now a 905(b) ship and the South Street Seaport Museum is not a 905(b) shipowner; and, accordingly, the plaintiff's exclusive remedy against the South Street Seaport Museum, his employer, is Workers' Compensation benefits under the New York Workers' Compensation Law (§ 11,29[6]; *Billy* v. *Consolidated Mach.*, 51 NY 2d 152), or at best (if the Court of Appeals' holding was wrong on the issue it addressed) under the LHWCA (§ 905[a]), but he most certainly may not sue the South Street Seaport Museum as a vessel owner under Section 905(b) LHWCA for courthouse damages.

Conclusion

The Petition for a Writ of Certiorari should be denied.

August , 1982

Respectfully submitted,

RAYMOND C. GREEN
Attorney for Third-Party Defendant-Respondent
The State Insurance Fund•
199 Church St.
New York, N.Y. 10007
(212) 962-8900

RAYMOND C. GREEN
SUSAN R. PETITO
On the Brief

PHOTOCOPIES OF STATUTES CITED FOLLOW

• The third-party defendant State Insurance Fund is South Street Seaport Museum's Workers' Compensation and Employers' Liability Insurer. As its answer shows, it disclaimed coverage on the ground that it insures only with respect to the Museum's liability in its identity as employer for injuries to employees, and plaintiff McCarthy's claim is premised upon a contention that the Museum's liability to him is not as employer but rather under Section 905(b) LHWCA because of a separate and distinct indentity-status as a shipowner. It is, furthermore, the State Insurance Fund's view that the third-party defendant Northbrook Excess and Surplus Insurance Company, the Museum's General Liability insurer, has the obligations first to defend and, next, if appropriate, to pay, inasmuch as plaintiff's claim is so premised upon an *alleged* status relationship with the Museum which is other than that of employer-employee. Despite the fact that plaintiff's claim of shipowner-status liability on the part of the Museum is one which steers away from the State Insurance Fund's coverage, the transparent baselessness and vexatiousness of the claim to all concerned has compelled the State Insurance Fund to ally itself throughout this litigation with the Museum's position.

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

§ 902. Definitions

When used in this chapter—

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

§ 11. Alternative remedy

The liability of an employer prescribed by the last preceding section[3] shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, spouse, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

§ 29. Remedies of employees; subrogation

6. The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ.

RELIGIOUS CORPORATIONS—DAMAGE CAUSED BY INFANTS —LIABILITY OF PARENTS OR GUARDIANS

Memorandum relating to this chapter, see Executive Memorandum, post

CHAPTER 76

Approved April 21, 1981, effective as provided in section 2

AN ACT to amend the religious corporations law, in relation to liability of a parent or guardian having custody of an infant for certain damages caused by such infant

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The religious corporations law is amended by adding a new section twenty-eight to read as follows:

§ 28. Limited liability of parents or certain legal guardians having custody of an infant for malicious and destructive acts of such infant. 1. Notwithstanding any other provision of law to the contrary, a parent or legal guardian, other than the state or a local social services department or a foster parent, having custody of an infant over ten and less than eighteen years of age, shall, if such infant knowingly, willfully and without authority breaks, defaces, defiles or otherwise damages any house of religious worship or any portion thereof, or any appurtenances thereto, or any religious vestment, book, scroll, art, furniture, ornament, musical instrument, article of silver or plated ware, or any other chattel or property used in connection with religious worship or instruction by a religious corporation, be held liable for such damage or destruction in a civil action brought in a court of competent jurisdiction. In no event shall such liability under this section be in excess of five thousand dollars. It shall be a defense to any action brought hereunder that restitution has been made pursuant to section seven hundred fifty-eight-a of the family court act or paragraph (f) of subdivision two of section 65.10 of the penal law. It shall also

be a defense to such an action brought under this section that such a child has become emancipated from his parent or legal guardian prior to the occurrence of such damage.

In lieu of such liability or in combination therewith, the court may order such infant to perform services for the public good to pay off such damage or destruction.

2. In any action brought hereunder, wherein a verdict for damages was rendered against a parent or legal guardian in an amount of one thousand dollars or more, the court wherein such verdict was returned shall, upon the application of the parent or legal guardian, review the financial ability of the parent or legal guardian to pay the amount of such damages in excess of one thousand dollars. In making such review, the court shall allow the parent or legal guardian the right to present evidence of financial hardship establishing the inability of such parent or legal guardian to pay any or all of the amount of such verdict in excess of one thousand dollars. Subsequent to the completion of such review the court may modify the amount of damages to be paid by a parent or legal guardian as returned in such verdict to an amount within the financial capacity of such parent or legal guardian, provided that no such modification shall reduce the amount of damages to be paid below the amount of one thousand dollars.

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law.

Additions in text indicated by underline; deletions by [brackets]